

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CIRBA INC. (d/b/a DENSIFY)
and CIRBA IP, INC.,

Plaintiffs,

v.

VMWARE, INC.,

Defendant.

C.A. No. 19-742-LPS

**DEFENDANT VMWARE'S RESPONSE TO
CIRBA'S NOTICE OF SUBSEQUENT DEVELOPMENT**

Dated: March 25, 2020

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Cirba's Notice of Subsequent Development Related to its Motion for Permanent Injunction (D.I. 642) is another attempt to circumvent the Court's Order regarding the post-trial briefing schedule and page limits (D.I. 574). The 37-page Notice—filed nine days before VMware's responsive post-trial brief is due—confirms that: (1) Cirba's request for an injunction targets an unreleased product not within the scope of adjudicated infringement; and (2) a one-month extension of VMware's responsive post-trial brief is warranted (*see* D.I. 638).

I. CIRBA'S NOTICE OF SUBSEQUENT DEVELOPMENT

Cirba's Notice makes clear that it is not seeking a permanent injunction against the products that were adjudicated at trial, *i.e.*, (i) vSphere with DRS, (ii) vROps with DRS, and (iii) VMC on AWS (cloud-based product) with DRS 2.0. (D.I. 642 at 2.) Rather, it only seeks to enjoin VMware from releasing an on-premises product (*i.e.*, vSphere 7.0) on the presumption that it contains compute policies and DRS 2.0. (*Id.* (“It seeks an injunction narrowly tailored only to compute policies in DRS 2.0 as used in vSphere 7.0.”).) But as VMware has already informed Cirba, its upcoming release of vSphere 7.0 with DRS 2.0 will not offer the very functionality—compute policies—that Cirba's injunction request targets. (Ex. A.)

Instead of addressing the issues related to the unreleased vSphere on-premises product in its post-trial reply brief, Cirba advanced additional arguments in the Notice to support its request for a permanent injunction. (D.I. 642 at 4.) For example, Cirba argues that (i) it would “have been technically impractical to remove the infringing features” from the upcoming vSphere 7.0 with DRS 2.0, and (ii) “the balance of the harms tips even more in favor of Densify, weighing in favor of granting a permanent injunction.” (*Id.*) Cirba urges VMware to “address[]” these additional arguments in VMware's responsive brief, further confirming that its Notice is just an extension of its opening brief. (*Id.*)

II. CIRBA’S NOTICE CONFIRMS THAT VMWARE’S REQUESTS FOR EXTENSION AND DISCOVERY ARE WARRANTED

The fact that Cirba’s Notice added additional arguments beyond those reflected in its opening brief warrants granting an extension on VMware’s responsive post-trial brief. As VMware explained in its letter brief, Cirba submitted four new declarations in support of its post-trial motion—spanning 89 pages of testimony and approximately 5,000 pages of exhibits. (D.I. 638 at 1.) VMware would be substantially prejudiced if not afforded reasonable time to take depositions of Cirba’s declarants and to prepare its own responsive declarations for submission in support of its responsive post-trial brief. (*Id.* at 1.)

By contrast, a one-month extension on VMware’s response would not prejudice Cirba. As Cirba concedes, it is no longer “appropriate to request expedited injunctive relief.” (D.I. 642 at 4 (“Given the global pandemic and VMware’s representation that vSphere with DRS 2.0 now is not infringing, it does not appear feasible or appropriate to request expedited injunctive relief pending resolution of Densify’s permanent injunction motion[.]”).) Thus, a short extension would have little impact, if any, on Cirba’s request for an injunction or other requested post-trial relief.

For reasons discussed above and in VMware’s letter brief (D.I. 638), a one-month extension would allow VMware to (i) test Cirba’s new fact and expert materials (including reviewing Cirba’s production of documents relevant to Cirba’s alleged loss of customers and employees, deposing Cirba’s declarants remotely, and preparing its own responsive declarations) and (ii) address Cirba’s additional arguments in the Notice.

Should the Court decline to grant VMware additional time to file its responsive post-trial brief, VMware requests that the Court allow it to submit supplemental briefing after VMware has had an opportunity to review its production of relevant documents and depose Cirba’s declarants.

III. VMWARE'S PROPOSED SCHEDULE

To this end, VMware requests that the Court adopt the following schedule:

1. By no later than April 1, 2020, Cirba shall produce to VMware all communications relevant to Cirba's alleged loss of customers and employees and all other communications that relate to the factual issues set forth in its four declarations;
2. Cirba shall produce its declarants (Jim Bergman, Gerry Smith, Andrew Hillier, and Riyaz Somani) for remote depositions on or after April 8, 2020;
3. The parties shall complete all depositions of Cirba's declarants by April 15, 2020; and
4. VMware shall submit its responsive post-trial brief by April 30, 2020.¹

Should the Court decline to grant VMware an extension to file its responsive post-trial brief, VMware proposes the following alternative schedule:

1. By no later than April 1, 2020, Cirba shall produce to VMware all communications relevant to Cirba's alleged loss of customers and employees and all other communications that relate to the factual issues set forth in its four declarations;
2. Cirba shall produce its declarants (Jim Bergman, Gerry Smith, Andrew Hillier, and Riyaz Somani) for remote depositions on or after April 8, 2020;
3. The parties shall complete all depositions of Cirba's declarants by April 15, 2020;
4. VMware shall submit its supplemental post-trial brief (no more than 10 pages) by April 30, 2020; and
5. Cirba shall submit its response to VMware's supplemental post-trial brief (no more than 5 pages) by May 7, 2020.

¹ To the extent that Cirba needs additional time to produce documents or make its declarants available for depositions, VMware is amenable to extend its proposed schedule, including the due date for VMware's responsive post-trial brief.

The proposed schedules only apply to Cirba's post-trial motion (D.I. 604) and in no way affect the briefing schedule for VMware's post-trial motion (D.I. 602), which should comply with the Court Order on February 12, 2020 (D.I. 574) as there is no basis for or reason to extend deadlines relating to that motion.

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CERTIFICATE OF SERVICE

I, Anne Shea Gaza, hereby certify that on March 25, 2020, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on March 25, 2020, I caused the foregoing document to be served via electronic mail upon the above-listed counsel and on the following:

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